GRANDEUR HOLDINGS SDN BHD

v.

CHONG KIM LEONG & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[PETITION NO: 26-9-2000]
14 OCTOBER 2005

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Orders for a reference to registrar for taxation of solicitor's bill of costs - Whether orders regular and within jurisdiction of a High Court judge - Legal Profession Act 1976, s. 130*

LEGAL PROFESSION: *Remuneration - Taxation of costs - Orders for a reference to registrar for taxation of solicitor's bill of costs - Whether orders regular and within jurisdiction of a High Court judge - Legal Profession Act 1976, s. 130*

CIVIL PROCEDURE: *Jurisdiction - High Court - Orders for a reference to registrar for taxation of solicitor's bill of costs - Whether orders regular and within jurisdiction of a High Court judge - Legal Profession Act 1976, s. 130*

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Proper mode of application - Whether by way of summons in chambers or by notice of motion - Whether merely a technical point - Whether application should be considered on its merits - Legal Profession Act 1976, s. 130(3)*

This was the respondents' application by way of summons in chambers in encl. 11 for, *inter alia,* an order that the orders given by KN Segara J on 1 September 2000 and 1 March 2001 ('the impugned orders') be set aside with costs. The orders were, in essence, for a reference to the registrar for taxation of a bill of costs for professional services rendered to the petitioner by the respondents, who were acting as the petitioner's solicitors in a sale and purchase transaction involving certain properties. The orders were also made in the absence of the parties. The petitioner submitted that the proper mode of the respondents' application herein should have been by way of notice of motion. The respondents, however, contended that since the petitioner had chosen to file a petition for an order under s. 130 of the Legal Profession Act 1976 ('the Act') that the bill of costs be taxed, the impugned orders should

be set aside. The petitioner's response was that the petitioner had received no copies of the petition from the court for service on the respondents, and that the impugned orders had been correctly made in the absence of the parties. Thus, the issue for determination was whether the impugned orders were regular and within the jurisdiction of a judge of the High Court.

Held (dismissing the appeal):

[1] On the basis of s. 130(3) of the Act, hereby applying and adopting the procedure in England, the proper mode of application was not by summons in chambers but by notice of motion. Be that as it may, it was also to be noted that notwithstanding the wrong mode of application in the instant case, the submission presented for the petitioner did not refer to any iota of prejudice or miscarriage of justice which the petitioner was likely to suffer by reason of the respondents having filed the summons in chambers instead of the notice of motion. The procedural point was highly technical in nature and should not render the rules of law ineffective. Thus, the application should be considered on its merits. (pp 706 c-e & 707 b)

[2] In considering a "petition of course" under s. 130 of the Act in *Perusahaan Petanda Bintang Sdn Bhd v. Ashir, Hira Singh & Co*, Vincent Ng J held that in England, the jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs was extended to cases in which no business had been done by him in the High Court, and that by virtue of s. 130(3) of the Act, this court was clothed with the same jurisdiction to make an order for delivery of the same in respect of contentious and non-contentious matters, which would include the sale and purchase transaction of the properties in the instant case. Hence, upon consideration of the factual background of this case and the law, the impugned orders were regular and were within the jurisdiction of a judge of the High Court. By way of *obiter*, having had the advantage of scrutinising the entire file, it must be added that had this petition been placed before this court for an *inter partes* hearing on its merits, in the light of the factual background of this case and the governing principles of law, the jurisdiction would have been invoked and an order made under s. 130 of the Act. On the foregoing grounds, the application in encl. 11 was devoid of merits. (pp 708 g-h & 709 a-b)

Case(s) referred to:

Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 HC ***(refd)***
Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***
Feedmeal Malaysia Sdn Bhd v. The Cho Yeow & Ors [2003] 7 CLJ 11 HC ***(refd)***
Koperasi Belia Nasional Bhd v. Dublee Holdings Sdn Bhd, para 1410 Mallal's Digest Vol 2 HC ***(dist)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***
Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC ***(refd)***
Muniancy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(refd)***
Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co [1995] 3 CLJ 234 HC ***(foll)***
Phua Choon Hwang & Anor v. Hassan & Kong Yeam [1987] 1 MLJ 156 ***(dist)***
Saemah Hj Mahadi v. Public Bank Bhd, Mallal's Digest on Civil Procedure, para 3776 HC ***(refd)***
Terrnce Simon Marbeck v. Kerajaan Malaysia [2003] 6 CLJ 120 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 126(2), 128, 130(1), (2), (3)
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 8 r. 2, O. 32 r. 1

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, para 139
Halsbury's Laws of England, 4th edn, vol 44, para 197

For the respondents - LK Tiu; M/s Koh Kim Leng & Co
For the petitioner - CC Aiyathurai; M/s CC Aiyathyurai & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is the respondents' application by way of summons in chambers in encl. (11) filed on 19 April 2001 for, *inter alia*, an order that the orders given by KN Segara J on 1 September 2000 and 1 March 2001 ("the impugned orders") be set aside with costs.

Factual Background

A narrative of the relevant factual background may be unfolded as follows:

Pursuant to s. 130 of the Legal Profession Act 1976, *vide* petition of course dated 21 July 2000 in encl. (1) filed on 15 August 2000, the petitioner prays for an order that the bill of costs be taxed.

Unless the context otherwise requires, a reference hereinafter to a section is a reference to that section in the Legal Profession Act 1976.

Sometime in February 1994, the petitioner appointed the respondents who are advocates and solicitors practising as Koh Kim Leng & Co to act as the petitioner's solicitors in respect of the sale of properties held under Lot Nos 1550, 1552, 1553, 1554, 68, 740 and 742 in the mukim of Tanjong Minyak, Melaka ("the properties") by the petitioners to Sierraview Sdn Bhd, as contained in the sale and purchase agreement executed on 14 August 1995.

Upon completion of the sale and purchase transaction on 25 July 1996, the respondents allocated to themselves a sum of RM305,000 being fees thereof and also an additional sum of RM1,260,000 being a bonus which is 3% of the profit derived from the transaction.

Vide letters dated 25 April 1998, 2 May 1998, 9 June 1998 and 18 July 1998 issued by the petitioner's then solicitors Taye & Co, the petitioner requested the respondents to deliver a bill of costs for professional services rendered in the transaction.

Upon the respondents' failure to do so, the petitioner filed Melaka High Court originating summons No. 24-367-98 ("the originating summons") which was subsequently heard on 30 November 1999 when the respondents were ordered to deliver a bill of costs to the petitioner.

On 27 December 1999, the respondents delivered the bill of costs to the petitioner.

The respondents deposed in their affidavit in encl (12) that the petition in encl. (1) and the affidavit in support in encl. (2) had never been served on them and they only knew of the existence of the petition and the affidavit when they received from the court a copy of the letter dated 22 December 2000, which was addressed to the petitioner's present solicitors C.C. Aiyathurai & Co requiring the petitioner's solicitors to produce the order of the court made in the originating summons before the court could fix the hearing date for the bill of costs for taxation.

The court *vide* letter dated 5 February 2001 informed the respective solicitors for the parties herein that the bill of costs for taxation has been fixed for hearing on 21 March 2001.

On 21 March 2001, the respondents were represented by one Miss Lim Lee Hoon who informed the court that the respondents had not been served with the petition of which they had no knowledge.

The learned registrar then fixed the bill of costs for taxation for hearing on 19 April 2001.

Meanwhile, on 23 March 2001, the respondents conducted a file search and obtained a copy of the petition and the affidavit in support.

As the respondents were allegedly unsure of the notes of proceedings of the court, they sought clarification from the learned registrar but to no avail.

On 27 March 2001, the respondents filed a notice of appeal to judge in chambers ("the appeal") against the decision of the learned registrar made on 21 March 2001 fixing the bill of costs for taxation for hearing on 19 April 2001. The appeal had been fixed for hearing on 16 July 2001.

On 14 April 2001, the respondents received a letter dated 12 April 2001 together with a draft order dated 1 September 2000 from the petitioner's solicitors requesting the respondents to approve it within two days. The terms of the draft order stated to be made by KN Segara J are in essence to the effect that the bill of costs be referred to the registrar for taxation, and the order was made in the absence of the parties and their respective counsel herein.

As the respondents were allegedly unaware of the terms of the said draft order, they did not approve it, but instead *vide* letter dated 17 April 2001 suggested that an appointment be made with the learned Judge "to sort out and settle the same".

The respondents then wrote a letter dated 4 April 2001 to the registrar stating that as the appeal has been fixed for hearing on 16 July 2001, the taxation of the bill of costs fixed for hearing on 19 April 2001 should be postponed pending the hearing of the appeal.

On 14 April 2001, the respondents received a letter dated 13 April 2001 from the petitioner's solicitors stating that an order dated 1 March 2001 had been made by the learned judge against the respondents, again in the absence of the parties and their respective counsel herein.

A second bill of costs was delivered by the respondents to the petitioner on 19 April 2001 pursuant to the registrar's order made on 21 March 2001.

On 14 June 2005, the appeal had been withdrawn by the respondents.

Proper Mode Of Application

Learned counsel Mr. C.C. Aiyathurai submitted for the petitioner that the proper mode of the respondents' application herein should be by way of notice of motion, citing *Halsbury's Laws of England*, 4th edn., vol. 44 para 197 ("*Halsbury*'s para 197").

In response, Mr. LK Tiu, learned counsel for the respondents, submitted that the respondents' application by way of summons in chambers in encl. (11) is the correct procedure on the basis of s. 126(2).

In my judgment, the proper mode of application is of special significance and would require my consideration now, in the light of s. 130 which reads:

> **130 Order for delivery of solicitor's bill of costs by way of petition**
>
> (1) An order for the **delivery of a solicitor's bill of costs,** and for delivery up of any deeds, documents or other papers in the possession of the advocate and solicitor may, subject to any lien which such advocate and solicitor may have, **and for the taxation of the bill when delivered, be obtained on a petition of course.** (emphasis added)
>
> (2) Upon the petition being filed, the Registrar shall mark the order thereon forthwith, and draw up the order if necessary.
>
> (3) Subject to this section, the Court shall have the like jurisdiction as the High Court in England to make an order under subsection (1).

It is pertinent to point out that the impugned orders were made in the petition pursuant to s. 130 and not under s. 126 which the respondents have relied upon.

Section 126(2) specifically provides that any party aggrieved "by any order of court" may apply by summons in chambers that the same may be eg, set aside. The expression "any order of the court" contained in s. 126(2) must, in my view, be an order made under s. 126 and not under s. 130, because s. 130 does not contain a corresponding provision. However, s. 130(3) does clarify that our court shall have the like jurisdiction as the High Court in England to make an order under s. 130(1) (see also *Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co* [1995] 3 CLJ 234).

That being the case, I shall look for inspiration in England to ascertain the proper mode of making the instant application.

Halsbury's para 197 sets out the relevant passage as follows:

> **197. Procedure where incorrect form of application has been made in the Chancery Division.** An order obtained *ex parte* in the Chancery Division which should not have been so obtained may be discharged, and as a rule will be discharged with costs, although the court may deal with it on the merits. Application to discharge the order is made *by motion, the notice of which must state the objections to the order.* (emphasis added)

On the basis of s. 130(3), as alluded to above, I hereby apply and adopt the procedure in England, as a result of which I hold that the proper mode of application is not by summons in chambers but by notice of motion.

Be that as it may, it is also to be noted that notwithstanding the wrong mode of application in the instant case, the submission presented for the petitioner does not refer to any iota of prejudice or miscarriage of justice which the petitioner is likely to suffer by reason of the respondents having filed the summons in chambers instead of the notice of motion. The procedural point is in my view highly technical in nature.

An application by way of summons in chambers is governed by O. 32 r. 1 while a notice of motion is regulated by O. 8 r. 2 of the Rules of the High Court 1980. These rules provide for the vehicles for the purposes of obtaining the necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections.

In *Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p. 5, where the issue raised for the defendant therein was highly technical in nature which has not occasioned a substantial miscarriage of justice, I invoked O. 1A of the Rules of the High Court 1980 which came into force on 16 May 2002. Order 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

Under O. 2 r. 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice: see also *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 FC; *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 HC; *Megnaway Enterprise Sdn*

Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC; *Terrnce Simon Marbeck v. Kerajaan Malaysia* [2003] 6 CLJ 120 HC; and *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 7 CLJ 11 HC.

Further, in line with the jurisdiction of the High Court in England as stated in *Halsbury*'s para 197, *supra,* I shall now proceed to consider this application on the merits.

Petition Of Course

It was contended for the respondents that, inter alia, the petitioner had chosen to file the petition under s. 130 without serving it on the respondents, the impugned orders should be set aside. Reference was made to:

1. *Koperasi Belia Nasional Bhd v. Dublee Holdings Sdn Bhd,* para 1410 Mallal's Digest Vol 2 HC;

2. *Saemah bte Hj Mahadi v. Public Bank Bhd,* Mallal's Digest on Civil Procedure, para 3776 HC; and

3. *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586 FC.

The response of the petitioner is that the petitioner had received no copies of the petition from the court for service on the respondents, and that the impugned orders had been correctly made in the absence of the parties. Support was sought, *inter alia*, in *Phua Choon Hwang & Anor. v. Hassan & Kong Yeam* [1987] 1 MLJ 156 HC; *Perusahaan Petanda Bintang Sdn Bhd, supra; Halsbury's Laws of England,* 4 edn., vol. 37 para 139 ("*Halsbury*'s para 139").

In my judgment, the answer to the aforesaid divergent submissions may be established by a true construction of s. 130.

In this respect, judgments which were not concerned with s. 130 are unlikely to be of any assistance. Hence, the judgments of Siti Norma Yaakob J (now CJ(M)) in *Koperasi Belia Nasional Bhd, supra;* and of Mohamed Dzaiddin J (later CJ Malaysia) in *Phuah Choon Hwang & Anor., supra,* in which the issues were confined to ss. 126 and 128 only cannot in my view support the respective contentions presented for the parties herein.

The judgment of James Foong J (now JCA) in *Saemah bt Hj Mahadi, supra,* is not an authority on a petition of course under the Legal Profession Act 1976; neither is the judgment of the Federal Court delivered by Edgar Joseph Jr FCJ (as he then was) in *Muniandy, supra.*

Having carefully considered the relevant submissions, I am of the view that on the merits the issue for determination is whether the impugned orders were regular and within the jurisdiction of a judge of our High Court.

In this regard, s. 130(1) enables an order for the delivery of a solicitor's bill of costs to be obtained on a petition of course. This expression is not without significance. *Halsbury*'s para 139 contains the following passage:

> **139. Beginning proceedings by petition.** A petition is one of the prescribed modes of beginning proceedings in the High Court. It comes before a judge in open court. There is also what is known as a *"petition of course" which initiates unopposed applications and without any hearing before a judge*. A petition other than a petition of course is sometimes referred to as a "special petition. (emphasis added)

To para 139, the footnote added:

> Originating **petitions of course** are in common use only under the Solicitors Act 1974, s. 70 (application in clear cases for taxation of a solicitor's bill of costs): … For forms, see 36 Court Forms (2nd Edn) (1977 issue) 276, 286, 288, 291 Forms 58, 70, 73, 79. (emphasis added)

Relevant to the application before me is Form 58, at p. 276, which is intended to be used for a petition of course by client for delivery of bill of costs and of papers, and for taxation of a bill. It is noted at p. 277 that this petition is not required to be served on any person. This is the crux of the petition of course ie, it may be dealt with by a judge in the absence of the parties.

Section 130(2) specifically provides that upon the petition of course being filed, it is mandatory for the registrar to mark the order thereon forthwith and draw up the order if necessary.

In considering a petition of course under s. 130 in *Perusahaan Petanda Bintang, supra*, Vincent Ng J held at p. 464 B to C that in England, the jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs is extended to cases in which no business has been done by him in the High Court, and that by virtue of s. 130(3), this court is clothed with the same jurisdiction to make an order for delivery of the same in respect of contentious and non-contentious matters, which in my view would include the sale and purchase transaction of the properties in the instant case.

Hence, upon an anxious consideration of the above factual background and the law, I am of the view that the impugned orders are regular and they are within the jurisdiction of a judge of our High Court.

By way of obiter, having had the advantage of a meticulous scrutiny of the entire file, I would like to add that had this petition been placed before me for an *inter partes* hearing on its merits, in the light of the above factual background and the governing principles of law, I would have invoked the jurisdiction and made an order under s. 130.

Conclusion

On the foregoing grounds, I hold that the application in encl. (11) is devoid of merits and is hereby dismissed with costs.